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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 111.

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney for the County of Sedgwick, State of Kansas,
Appellants,

vs.

FRANK C. SCRUPA, d/b/a CREDIT ADVISORS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

BRIEF OF APPELLEE.

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Appellants,

vs.

FRANK C. SCRUPA, d/b/a CREDIT ADVISORS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

BRIEF OF APPELLEE.

This is an appeal from an order of a three-judge federal court reported at 210 F. Supp. 200 (D. Kan. 1961), which order enjoined the Attorney General of the State of Kansas and the County Attorney of Sedgwick County from

enforcing an unreasonable and arbitrary statute which prohibited the Appellee, a Nebraska citizen, from carrying on a lawful business in Kansas.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statute, Senate Bill 366, Session Laws of 1961, Chapter 190, page 378, now found without title in Kansas General Statutes, 1961 Supp., 21-2464, page 461, which the court held constituted an improper prohibition of a lawful business, reads as follows:

"AN ACT CONCERNING THE BUSINESS OF DEBT ADJUSTING; MAKING CERTAIN ACTS UNLAWFUL AND PRESCRIBING PENALTIES THEREFOR.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

"SECTION 1. For the purpose of this act, 'debt adjusting' means the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon. Whoever engages in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment; PROVIDED, That the provisions of this act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book." (Statute published 6-30-61).

Article 2, Section 16 of the Kansas Constitution, G.S. 1949, Preface, Page XLVIII, provides:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed." (Article 2, Section 16).

Article I, Section 10 of the Constitution of the United States, provides as follows:

> "Sec. 10. *Limitations on states.* No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Section 1 of the Fourteenth Amendment of the United States Constitution provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the Bill of Rights of the Constitution of the State of Kansas, G.S. 1949, Preface, Page XXXVIII, provides as follows:

> "1. *Equal rights.* All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

Section 17 of the Bill of Rights of the Constitution of the State of Kansas, G.S. 1949, Preface, Page XLIII, provides as follows:

> "17. *Property rights of citizens and aliens.* No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law."

THE QUESTIONS PRESENTED FOR REVIEW.

I.

Did Senate Bill 366, Session Laws of 1961, Chapter 190, Page 378, concern or deal with the practice of law or a definition of same, partial or otherwise, or exempt lawyers from an otherwise absolute prohibition of certain acts, in violation of the Kansas constitution, Article 2, Section 16, and thus constitute a denial to the Appellee of the equal protection of the laws within the meaning of the 14th Amendment of the Constitution of the United States?

II.

Does the subject matter of Senate Bill 366, Session Laws of 1961, Chapter 190, Page 378, have the effect of practically prohibiting an otherwise lawful activity and thus constitute an arbitrary and unreasonable prohibition of a lawful business, rather than a reasonable regulation of same?

III.

Does the presumption of validity attach to the enactment of a state statute which is practically a verbatim

adoption of another state's act, which prior to adoption in Kansas was adjudicated to be unconstitutional?

IV.

Since the pronouncement of this court in *Adams* v. *Tanner* was adopted as late as 1960 by the Kansas Supreme Court as a correct interpretation of a test to determine the constitutionality of a Kansas statute did not the trial court correctly apply that rule to the law in question?

A CONCISE STATEMENT OF THE CASE.

The Appellants, in attempting to characterize as a racket what the trial court on evidence found to be a lawful business, refer to undocumented, irresponsible, non-admitted magazine articles and other hearsay and self-serving matters but the trial court's finding was predicated on the specific wording of the statute (R. 127-130) on appellee's undisputed evidence. We submit that Appellants in their brief have chosen to ignore the material evidence in this case, to wit:

Appellee's business is operated in both Omaha and Wichita under the name "Credit Advisors" and the nature of the business is financial management of people who are having trouble with consumer debt. Appellee works out a budgeting program for them and attempts to help them out over a period of time (R. 9). It is correct to say that in Appellee's business he makes contracts with debtors whereby they agree to pay Appellee (R. 9) a set amount of money periodically which, for a consideration, Appellee distributes among certain specified creditors in accordance with a plan agreed upon with the debtor (R. 10). Plaintiff has spent in excess of Twenty Thousand Dollars in es-

tablishing this business in Kansas and has in force a substantial number of contracts to distribute money as directed by those contractees which involves approximately Fifteen Thousand Dollars per month (R. 10). Appellee's employees are bonded in an amount sufficient to protect debtors and creditors against loss by embezzlement or dishonesty in performing these contracts (R. 11). Appellee's services consist merely of financial advice and a budgeting system (R. 13). Appellee makes a written agreement with a debtor whereby the debtor undertakes to make weekly or monthly deposits with Appellee and then Appellee undertakes to use his best efforts to persuade the creditors to accept the payments according to the plan and if this is successful, Appellee distributes the payments and for his services his compensation is a percentage of the scheduled amount equivalent to between five and nine percent of the total over-all indebtedness (R. 16). There is no charge to come into Appellee's office and talk over a man's problems (R. 81). This business has been carried on by reputable firms in this country for over a quarter of a century and similar businesses are being operated in most of the metropolitan areas of the country (R. 76). Communities have long recognized the need for this type of service and it is sometimes carried on by non-profit organizations where private business does not fill the need (R. 76).

Appellee offers financial budgeting advice only and does not attempt to advise debtors as to any of their legal rights and if there is a question concerning an account or other questions which appear to be of a legal nature it is suggested that the debtor consult an attorney of his own choosing (R. 16, 30 and 82). Appellee does not attempt to compromise or discount the principal amount of indebtedness (R. 29). Appellee testified, and it was admitted in the trial below in response to questions by Judge Huxman,

that the Act in question would put the Appellee out of business in the State of Kansas (R. 67 and 68).

The Court below found as follows: "Kansas, in passing the Act in question [Senate Bill 366, Session Laws of 1961, Chapter 193, Page 378], apparently took it almost verbatim from a similar Pennsylvania statute. The wording of the two acts is almost identical. The superior court of Pennsylvania, in a well-reasoned opinion, declared the Pennsylvania Act unconstitutional" (R. 129). Prior to the adoption of the same by Kansas, the Pennsylvania court held that the enactment of such a statute was an abuse of police power. *Commonwealth* v. *Stone*, 191 Pa. Super. 117, 155 A.2d 453.

It should here be noted, in connection with the application of the National Better Business Bureau to file a brief *amicus curiae* containing unadmitted and undocumented charges of alleged abuses in connection with the business here involved, that the undisputed evidence in this case is that there have been no complaints filed against Appellee with the Better Business Bureau (R. 78).

In this connection the only other state law relating to the subject matter of the Kansas Act was a copy of the Oklahoma statutes, annotated, Title 24, Chapter 1, Section 15, which was offered in evidence by the plaintiff and received by the court (R. 109) as plaintiff's exhibit 1 and is copied at Record 114. It deals with the identical subject matter as the Kansas Act but makes it a criminal offense for a lawyer to engage in the act, even if only incidental to his practice. (See also Ohio Rev. Code 4710.01.)

In the event that the court feels that it can take judicial notice of enactment of other states in the union with respect to the subject matter of this Act, as did the court below (R. 109), we submit this court should find, as did

the court below, that "no statute, aside from the Pennsylvania statute * * * has gone that far". It appears that thirty of the fifty states in the union have not found legislation on this subject necessary. Two states, Massachusetts and Virginia, have declared that the furnishing of advice or services for debtors in connection with any debt-pooling plan for a consideration constitutes the practice of law. Ten states have legislation, limiting by classification the people eligible to engage in the activity without regard to or limitation on the extent of that activity, and have inserted in their acts numerous exemptions, such as in the New Jersey Act, which does not apply to attorneys at law, any person who is in the regular employ of a debtor acting as an adjuster of his employer's debts, any person acting pursuant to any court order and any person who is a creditor of the debtor.

The most common feature of legislation in the states which regulate the business but do not classify those eligible to participate is the requirement of a license and bond and the fixing of charges for the service. Other types of regulation involve the regulation of advertising, keeping of records for inspection, and prohibition of soliciting the sale of insurance policies to the debtor. None, to our knowledge, prohibit the extent to which those eligible by classification may practice the activity except the enactments of Pennsylvania and Kansas, which statutes have been declared unconstitutional.

SUMMARY OF ARGUMENT.

1. The Kansas statute was not a valid exercise of the state's police power.

2. The majority opinion of the three-judge district court was proper, and correctly construed the act in ques-

tion as an unlawful and unreasonable prohibition of a lawful business activity and properly held it to be an unreasonable and unwarranted regulation under the police power.

3. The Kansas statute, if construed as dealing with, applying to, or concerning, regulating or defining the practice of law, violated the Kansas Constitution (Article 2, Section 16), and its enforcement would destroy the Appellee's constitutional rights, deprive him of property without due process of law in violation of the 14th Amendment to the Constitution of the United States and Sections 1 and 17 of the Bill of Rights of the Constitution of the State of Kansas.

4. The court below properly assumed that because there was nothing in the title respecting lawyers, law practice, a definition of the practice of law, or other reference to the unauthorized practice of the law, and correctly interpreted the act as applying only to a lawful activity unrelated to the practice of law and thus an unreasonable and unwarranted prohibition of a lawful business activity.

5. The majority opinion below properly applied the rules of construction and the tests which the Supreme Court of Kansas has said were proper in determining the validity of Kansas enactments.

6. The court below did not rely upon, but did reach the same conclusion as the Court in Pennsylvania (*Commonwealth* v. *Stone*, 191 Pa. Super. 117, 115 A.2d 453 [1959]) which applied the same test of constitutionality as that strictly applied by the Supreme Court of Kansas in the case of *Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672, and this was the same rule as that announced by this court in the case of *Adams* v. *Tanner*, 244 U.S. 590 (1917).

7. The majority opinion below properly rejected the decision of the New Jersey court in upholding a New Jersey statute (*American Budget Corporation* v. *Furman*, 67 N.J. Super. 134, 170 A.2d 63), properly holding that the New Jersey statute differed in several particulars from the act in question.

8. The rule announced in *Adams* v. *Tanner*, *supra*, has never been overruled and in 1960 was adopted by the Supreme Court of Kansas as a proper test to determine the validity of Kansas legislative enactments.

9. The trial court correctly construed the specific wording of the statute in question and determined that it in effect was designed to be prohibitory in nature rather than a reasonable regulation of an otherwise lawful business activity, the trial court properly adopting the Kansas criterion that a lawful business could not be prohibited but could only be regulated, by the Kansas legislature. (*Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672.)

10. The court correctly concluded that the act in question was, if not an absolute prohibition, an unreasonable and arbitrary regulation of a lawful business not reasonably adapted to a correction of the claimed abuses purportedly giving rise to the legislation.

11. The statute in question should not carry a presumption of constitutionality despite Appellants' contention to the contrary, for the reason that the act adopted by Kansas was practically verbatim, the same as a Pennsylvania enactment that had previously been declared unconstitutional and for the additional reason that the statute on its face indicated a violation of the test of constitutionality adopted by the Kansas Supreme Court with respect to Kansas statutes shortly prior to its enactment, and this situation is not contemplated by the doctrine enun-

ciated in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, with respect to the presumption of validity. Regardless of the applicability of a presumption of constitutionality, the statute in question was clearly shown to be invalid.

ARGUMENT.

I. The Court Below Correctly Interpreted the Act in Question and the Majority Opinion Should Be Sustained.

In construing this act as an unreasonable and arbitrary prohibition of a lawful business activity, the court was constrained by ordinary rules of interpretation and construction of statutes to assume that the Kansas legislature did not violate the Kansas Constitution in passing the enactment and thus concluded that the subject matter of the bill did not deal with that which was omitted from the title, to wit: reference to the unauthorized practice of law; limitations on the practice of law; or limitations on persons engaged in the practice of law. Any other assumption by the court would have compelled them to have declared the enactment invalid and not conforming with the specific requirements and the minimum safeguards of the Kansas Constitution which provides:

> "No bill shall contain more than one subject which shall be clearly expressed in its title."

The court below, comprised of eminent Kansas jurists, were well aware of this constitutional provision and of the strict enforcement of the Kansas constitutional provision which the Kansas Supreme Court had uniformly given to it, and of the rule of construction that they should, if possible, construe a statute so as not to be in conflict with the Constitution of the State where it was enacted.

The result was inevitable. So construed, the activity made criminal by the statute was an otherwise lawful activity, to wit: the making of an agreement to perform services for another person consisting of a distribution of that person's money to the persons to whom he directed it to be distributed, for an agreed compensation. Hence, the lawful activity condemned, though subject to reasonable regulation, could not be arbitrarily restrained or prohibited.

The court below was aware of the decision of the Kansas Supreme Court in *Manor Baking Company* v. *City of Topeka*, 225 P.2d 89, 170 Kan. 292, 298, where the court said:

> "The amendment, if given the force and effect contended for by the city, clearly would be outside of and foreign to the title of the bill, thus rendering the act unconstitutional and void.
>
> "In either event, plaintiff would be entitled to the relief prayed for which was granted by the lower court and its judgment was therefore reaffirmed."

We respectfully submit that this is true in the instant case.

The Kansas Constitution and the construction given it by the Kansas Supreme Court has emphasized the strictness of this requirement, that the subject matter of all Kansas legislation, to be valid, must be clearly expressed in the title. This is illustrated by the decision in the case of *State ex rel.* v. *Kirchner*, [3-8-58] 322 P.2d 759, 182 Kan. 622, where the court invalidated the enactment of a severance tax on oil and gas. In this case the title to the act read:

> "An Act providing for the assessment, levy and collection of a tax upon the gross value of certain products and providing for the disposition of revenues received from such tax; and providing penalties for the violations of the act."

The court at page 625 held the title inadequate and stated:

> "* * * the subject of this act is not clearly expressed in its title. The title merely refers to the levy of 'a tax upon the gross value of certain products'. As to WHAT products are to be taxed, and the NATURE of the tax, the reader is left to his imagination, and resort must be had to the body of the act in order to discover that in reality the subject matter is a PRIVILEGE TAX ON THOSE PERSONS ENGAGING IN SERVING OIL OR GAS. By no stretch of the imagination can it be said the SUBJECT of this act is CLEARLY EXPRESSED in its title. Expediencies of the moment, or the exigencies of a situation—political, economic or otherwise—afford no ground for disregarding the express mandate of the Constitution.
>
> "The title of the act being fatally defective, the entire act is unconstitutional and void." [Emphasis supplied BY THE COURT].

In *State ex rel.* v. *City of Wichita,* (2-20-59) 335 P.2d 786, 184 Kan. 196, the court held that the title to the act referred only to power of cities to "*license* trades, occupations, businesses and professions", and thus, did not properly contain the subject matter of *licensing for revenue* purposes, and declared the act invalid as violative of the Kansas Constitution, Article 2, Section 16. The third syllabus written by the court is as follows:

> "3. STATUTES—*Title of Act—Sufficiency of Expression Subject.* Where the title of an act is not broad enough to include everything contained in the act, that which is not included within the title must be held invalid since courts have no power to enlarge or extend or amplify the title to an act any more than they have to enlarge or diminish or change the act itself."

As late as April 7, 1962, in *School District, Joint No. 71* v. *Throckmorton*, 370 P.2d 89, 189 Kan. 590, at 592, the Supreme Court of Kansas stated with respect to an act providing for the mandatory unification of school districts, and declaring it to be invalid, stated:

> "Section 29 of the act would seem to contain matter not covered in the title of the act since it appears that the unified school districts referred to in Section 29 are districts which are not organized 'by a vote of the people' as the title provides. Thus Article 2, Section 16 of the State Constitution would appear to be violated."

Thus it is clear that the ordinary lawful activity of distributing money for another to designated persons for a consideration is either not the practice of law and wholly unrelated to it, and therefore the prohibition of such activity rather than its regulation is arbitrary, unwarranted and unreasonable; or, on the other hand, if the Act is construed as relating to, affecting and regulating or defining the practice of law it is clearly invalid as a violation of the Kansas Constitution (Art. 2, Sec. 16) and its enforcement against this non-resident would deprive him of his rights under the 14th Amendment to the Constitution of the United States, in either event.

Thus, it cannot be enforced against the plaintiff and be the means for stopping his otherwise lawful activity by the imposition of criminal sanctions without violating the due process clause of the 14th Amendment of the Constitution because the enforcement, in Kansas by Kansas authorities against a non-resident of the state, of a statute which violates the Kansas Constitution, is, we respectfully submit, a violation of the 14th Amendment of the Constitution of the United States and would result in permitting the state to deprive the Appellee of liberty and property

without due process of law and would be a denial to the Appellee of the equal protection of the law of the State of Kansas, to-wit: its Constitution. In *Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672, at Page 677, it is stated:

> "By constitutional provisions all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness, *and no distinction shall ever be made between citizens of the State of Kansas and the citizens of other states and territories of the United States in respect to the purchase, enjoyment or descent of property.* (Kansas Constitution, Bill of Rights, §§ 1 and 17.)"

On the other hand, if the statute is construed as having no relationship to the practice of law, then the lawful activity of distributing another's money by agreement to those whom he directs for an agreed consideration is not such an activity that the state can prohibit it or impose such unreasonable restrictions on its exercise as to virtually amount to a prohibition of it, particularly where reasonable regulations would correct any assumed or imagined abuses that might accompany the exercise of the otherwise lawful pursuit of happiness. In *Gilbert* v. *Mathews, supra,* it is stated:

> "The business is affected with a public interest and is subject to reasonable legislative restriction and regulation to prevent abuses and frauds. Requirements for the licensing of auctioneers and auctions as well as other regulations which are reasonable and not wholly arbitrary have long been upheld. *The right to regulate and license the business does not, however, include the right to prohibit it directly OR IN EFFECT, TO ADOPT UNREASONABLE AND UNFAIR REGULATIONS, OR SUCH REGULATIONS AS WOULD BE OPPRESSIVE OR HIGHLY INJURIOUS TO THE BUSINESS.* * * *" (Emphasis supplied).

Appellants have criticized the trial court's majority opinion as [brief of Sanborn, Pages 4, 5] fallaciously assuming that the activity prohibited constitutes a "lawful business". It certainly is clear that the activity defined in the statute is an otherwise lawful activity. Appellants have sought to obscure the evidence of record in this case on which the lower court predicated its opinion (*i. e.*, a lawful business) by the use, in its brief, of voluminous quotations from self-serving publications, news articles, magazines and publications engendered by the "short term loan companies", and such publications as Personal Finance Law Quarterly [Sanborn's brief, Pages 7, 8, 9, 10] in an effort to have this court reach a different conclusion with respect to the character of *the activity defined in the act* and prohibited thereby. We respectfully submit that these self-serving articles are not matters which should receive judicial notice by this court, they were not in the record below, and their use as references in the brief in effect deprive the Appellee of the right of cross-examination and rebuttal, with respect to the nature, extent and frequency, as well as the correctness and accuracy of such articles and publications, especially as they purport to relate to the specific activity defined and prohibited by the Act.

Sanborn further argues [Brief, Page 11] that the Kansas legislature also considered that "debt adjustment" necessarily entailed the practice of law. Again, Sanborn in his brief, Page 15, continues to contend that the Act involves the subject matter of lawyers and law practice. These contentions, if correct, would compel a holding that it was invalid and in violation of the Kansas Constitution (Article 2, Section 16) and thus would entitle Appellee to an affirmance of the order declaring the law invalid and enjoining its enforcement against the Appellee.

While it is true that the majority opinion is predicated upon an assumption that the legislature did not violate the Kansas Constitution because the activity prohibited did not relate to the practice of law, but only concerned a lawful business activity, the conclusion is then inevitable that the Act so construed is unreasonable, unwarranted and a prohibition rather than a regulation and thus a violation, not only of the Kansas Constitution, but also the 14th Amendment of the Constitution of the United States.

THE COURT BELOW APPLIED THE PROPER CRITERIA RESPECTING CONSTITUTIONALITY.

The criteria for determining the validity of state legislation such as this under the 14th Amendment to the Constitution of the United States was pronounced by the Supreme Court of the United States in *Adams* v. *Tanner*, 244 U.S. 590, 37 S. Ct. 662, where this court struck down as unconstitutional a state statute prohibiting the charging of fees by an employment agency. The court there stated at page 664:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations, but this is not enough to justify destruction of one's right to follow a distinctively useful calling in an upright way."

Further quoting from *McLean* v. *Arkansas*, 211 U.S. 539, 547, 548, 29 S. Ct. 206, the court states:

> "'It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution.'"

Further quoting from *Murphy* v. *California*, 225 U.S. 623, 628, 32 S. Ct. 697, the court said:

> "'The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.'"

The Appellants here have suggested that the case of *Adams* v. *Tanner* has been impliedly overruled by this court. We contend that this is not an accurate statement of the present status of the doctrine of *Adams* v. *Tanner*. Later cases have restricted the application of *Adams* v. *Tanner* to cases where a clear showing can be made that a statute in effect prohibits an otherwise lawful business or attempts to regulate that business in an unreasonable, arbitrary or oppressive manner, but those cases have not overruled it.

Later cases following *Adams* v. *Tanner* were *New York Life Insurance* v. *Dodge*, 246 U.S. 357, 38 S. Ct. 337; *Kennington* v. *Palmer*, 255 U.S. 100, 101, 41 S. Ct. 303, 304; *Meyer* v. *State of Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 627; *Weaver* v. *Palmer Bros.*, 270 U.S. 402, 415, 46 S. Ct. 320, 323; *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 526-527, 46 S. Ct. 619, 626; *Tyson Bro.-United Theater Ticket Offices* v. *Banton*, 273 U.S. 418, 443, 273 U.S. 418, 432; *Fairmont Creamery Co.* v. *State of Minnesota*, 274 U.S. 1, 9, 47 S. Ct. 506, 508; *State of Washington* v. *Roberge*, 278

U.S. 116, 121, 49 S. Ct. 50, 52; and *Southern Railway Company* v. *Commonwealth of Virginia,* 290 U.S. 190, 196, 54 S. Ct. 148, 150, all of which cases struck down as unconstitutional state statutes held to be prohibitions or unreasonable regulations of lawful activities.

At the same time that this court was continuing to apply the rule of *Adams* v. *Tanner,* it properly upheld the right of the states to enact reasonable regulatory measures. We respectfully submit that the confusion which has arisen with regard to the rule announced in *Adams* v. *Tanner* stems from a citing of *Adams* v. *Tanner* in the dissenting opinions in those cases involving different factual situations which made the rule inapplicable therein. Such cases were *Calhoun* v. *Massie,* 253 U.S. 170, 182, 40 S. Ct. 474, 478, where the majority opinion upheld a state law regulating the amount of compensation which the government would allow to an agent or attorney for service in a government claim matter; *O'Gorman and Young* v. *Hartford Fire Insurance Company,* 282 U.S. 251, 267, 51 S. Ct. 130, 135, where the majority opinion upheld the right of a state to limit an agent's commission on a fire policy to a reasonable amount; also the often cited case of *Nebbia* v. *People of the State of New York,* 291 U.S. 502, 54 S. Ct. 505, where the court upheld the right of the City of New York to control milk prices.

In the Nebbia case, the court pointed out that prior to the enactment, the legislature of the State of New York had made a thorough investigation of the problems involved in fluctuation of milk prices and had taken reasonable steps to regulate with the definite intention of curing the specific evils found by the legislation to exist. We submit that the following excerpt from the majority opinion, 291 U.S. at page 525 and 54 S. Ct. at pages 510-511, reaffirms the Appellee's contention here. It reads:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental *regulation* for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. and the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.*" [Emphasis supplied].

Subsequent to the Nebbia case, we respectfully submit that in practically all of the instances where state legislation was reviewed by this court and upheld as valid, it involved *regulatory* legislation rather than *prohibitory* and was so characterized by the decisions of this court affirming the same. For example in *Olson* v. *State of Nebraska,* 313 U.S. 236, 61 S. Ct. 862, the court upheld a statute which did not prohibit an employment agency from collecting a fee, as was the case in *Adams* v. *Tanner,* but did fix the maximum compensation which an employment agency might collect dealing with it. This decision, we submit, is consistent with *Adams* v. *Tanner* and although there was reference to the Tanner case in the decision in *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.,* 335 U.S. 525, 69 S. Ct. 251, 256, neither it nor the Olson decision overruled or destroyed the holding in *Adams* v. *Tanner.* Subsequently, the decision in *Breard* v. *City of Alexandria,* 341 U.S. 622, 71 S. Ct. 920, distinguished and thus in effect recognized the continued validity of, and did not contradict, the rule announced in *Adams* v. *Tanner,* the court stating at page 927:

> "Decisions such as Leibmann and Tanner, supra, invalidating legislative actions, are hardly in point here."

The Attorney General of the State of Kansas and the County Attorney of Sedgwick County, Kansas, Appellants herein, in contending that *Adams* v. *Tanner, supra,* should not have been applied to the legislation in question, run counter not only to the prior adjudication by the Pennsylvania court in *Commonwealth* v. *Stone,* 191 Pa. Super. 117, 155 A.2d 453, but also to the 1960 decision of the Supreme Court of Kansas, which cited with approval the application of the rule of the Tanner case in its decision in *Gilbert* v. *Mathews,* (186 Kan. 672, at page 681, 52 P.2d 58) which decision invalidated a similar Kansas enactment to the act here in question on the ground that the activity then virtually prohibited was another lawful activity, the court declaring:

> "Abuses may and probably do grow up in connection with the auction business and are adequate reason for regulation, *but this is not enough to justify destruction of one's right to following a distinctly useful calling in an upright way.*"

Unless this court is willing to say that a different test or rule must be applied as a criteria of validity to a Kansas enactment, the court's decision below must be affirmed.

The manipulation without notice of the act in question through the Kansas legislature was an example of the evil which the majority opinion in *Adams* v. *Tanner* contemplated as probable when it said:

> "Skilfully directed agitation might also bring about apparent condemnation of any one of them [distinctly useful callings in an upright way] by the public."

II. The Act in Question Is Not Confined to the Promulgation of Means That Are Reasonably Necessary for the Accomplishment of the Purpose of Regulation and Is Unduly Oppressive upon Appellee Because It Is an Arbitrary and Unreasonable Prohibition of an Ordinarily Lawful Activity Rather Than a Valid Regulation of Same.

We respectfully submit that it is well settled that a state may not, under the guise of protecting the public by regulation, arbitrarily prohibit a person from engaging in the lawful private business or impose unreasonable and unnecessary restrictions upon such an activity or business. *Newstate Ice Co.* v. *Leibmann*, 285 U.S. 262, 278, 52 S. Ct. 371, 374, in which the court said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, *nothing is more clearly settled* than that it is beyond the power of the state, 'under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations *or impose unreasonable and unnecessary restrictions upon them.*' " (Emphasis supplied).

We know of no refutation or contradiction of that rule. See also *J. Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 44 S. Ct. 412, 413; *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402, 46 S. Ct. 320, 323; *Louis P. Liggett* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 47, 49 and *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 52 S. Ct. 408, where the Court also said, at Page 411:

"* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public *and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.*" (Emphasis supplied).

The Kansas Supreme Court, seven months prior to the legislative session in which the Act in question was passed, to-wit, on May 14, 1960, published a decision in the case of *Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672, page 685, striking down as unconstitutional a law passed by the 1955 Kansas legislature and declared the rule to be:

"In appraising the validity and effect of the statute it is proper to examine and determine what may be required under it pursuant to its provisions. *The inquiry is not confined to what has been done under the act in any particular instance, but what may be done under and by virtue of its authority. The constitutional validity of a law is tested by what may by its authority be done.* (11 Am. Jur., Constitutional Law, § 102, p. 737; *Montana Company* v. *St. Louis Mining & Co.*, 152 U.S. 160, 38 L.Ed. 398, 14 S. Ct. 506; *Burtch* v. *Zeuch*, 200 Iowa 49, 202 N.W. 542, 39 A.L.R. 1349; *Replogle* v. *Little Rock*, 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333; and *Abbott* v. *McNutt*, 218 Cal. 225, 22 P.2d 510, 89 A.L.R. 1109).

The Kansas statute in question prevents a bank, a trust company, a collection agency, a secretary, a public stenographer, or other individual or corporation from agreeing with another person that he will receive periodically sums of money for distribution to the persons designated by the person furnishing the money, irrespective of whether that person is a debtor, as is often the case, or whether he is merely an individual who is out of the country on an extended trip or confined, or unable, or unwilling to bother

with periodic distributions of money to persons with whom he has had dealings.

The activity which is prohibited is that of an ordinary agent and the Act virtually prohibits the rendition of a service which is needed in a free society and involves many situations quite common and generally recognized as an integral part of our free enterprise system. For example, a travelling salesman who is away from home a great portion of time, desires to see that his life insurance premium, the payment on the mortgage on his house and the contract for monthly payments on his new refrigerator are not overlooked or delinquent in order to protect his credit standing in the community, but he cannot arrange to deposit a lump sum monthly for distribution through Appellee to facilitate the calendaring and transmittal of the proper sums at the proper times to the proper persons. We respectfully submit that such is clearly a lawful activity, the prohibition of which, rather than its regulation, is prohibited by the safeguards written into the Constitution of the State of Kansas and of the Fourteenth Amendment to the Federal Constitution.

Attached to our brief in the lower court was a contract form prepared by one of the largest banks in Wichita and similar to those in use with some or most of the banks in the metropolitan areas whereby the depositor in the bank authorizes the bank to pay out on drafts, drawn by the depositor's specified creditors each month in payment of such items as insurance premiums, rentals, mortgage payments and existing installment debts and for that service the bank receives a specified amount for each draft so honored. This, we respectfully submit, is forbidden by the Act, and the prohibition is unreasonable, without warrant and has no real or substantial relationship to a protection of the public or other legitimate purpose. An arrangment concerning es-

crow contracts whereby periodic payments are made through a paid escrow agent and by him to the first mortgagee and to the seller who has conveyed the house on an installment sales basis is no longer legal if this enactment is good. The undisputed evidence in this record is that the Appellee has some clients who have no financial problems who avail themselves of his distribution services for their convenience or need (R. 77). All such appears now to be forbidden.

This unreasonable prohibition of an ordinarily lawful activity and practice carefully refrained from forbidding small loan companies, who can draw 3% per month interest in this state, from advertising to a debtor who owes five installment creditors to come in and consolidate his indebtedness in one loan and it permits them to distribute the proceeds of the loan, which is then the money of the debtor, to the various specified creditors. In fact, most of the articles and self-serving declarations alluded to by the appellants in their brief, but not offered in evidence, had their genesis in organizations sponsored or sustained in part by the so-called small or personal loan companies.

The Act does not even forbid the giving of advice, financial or otherwise, respecting the budget requirements of a debtor, nor does it forbid an individual, in connection with a budget problem, to try to arrange for a debtor a composition or compromise of his debts with creditors for a consideration, UNLESS HE ALSO DISTRIBUTES THE DEBTOR'S MONEY PERIODICALLY.

Any careful scrutiny of the provisions of this Act will multiply the instances and the illustrations of the unreasonable, arbitrary and unwarranted prohibition of ordinarily lawful activities. It, therefore, seems indicated that this court should determine, as did the court below, whether a periodic distribution to creditors of a contrac-

tee's money in accordance with his instructions is reprehensible because it is periodic or whether or not it is of such a nature that the activity can be forbidden because the abuse that might arise in connection with it can not be considered to be reasonably susceptible of prevention or correction through reasonable regulations and safeguards —such as licenses, bonds, etc.

If the possibility of fraud in connection with all daily business transactions were ever held to be the basis for permitting a state legislature to forbid it, what economic liberty or pursuit would be left if that power was exercised to the full extent? Could not the legislature, in accordance with the appellant's claim that the public dealing with Appellee could be defrauded, use such a possibility to destroy the right to contract concerning a real estate brokerage business, a ready-to-wear shop's sales, the grocery store, the five and ten cent store, gasoline stations and the sale or rental of automobiles? Is it not inconsistent to say that the Constitution protects citizens in their right to contract and guarantee them freedom in the pursuit of happiness and the right to make a lawful living and yet that it can lawfully restrain them from the precise activity defined in this act, which was an ordinary lawful activity for over a quarter of a century until the Kansas legislature apparently intended to classify it as a crime for all save lawyers, and even then a crime if done as a specialty rather than an incidental matter.

It is true, as the court below affirmed, that the State has the power to regulate this activity, as well as all other activities which can be abused or which affect the public welfare and the court below clearly stated that proper regulations in setting up of standards and qualifications, or perhaps even limiting the business to certain classes of qualified persons, was reasonable and proper if the regula-

tions so framed bore a reasonable relationship to the purpose—that is to protect those in financial distress from exploitation by unscrupulous or dishonest operators; but the Act as passed condemns as Criminal the honest, conscientious person of integrity, who receives and periodically distributes money to designated persons for another if paid for that service.

We respectfully submit such legislation is contrary to the guarantees of both the Kansas and Federal Constitutions. The activity defined and condemned by the statute does not involve a matter affecting the public morals or the health of the public and the restrictions imposed are unusual and unnecessary and bear no reasonable relationship to the objects and purposes sought to be obtained. This court, as late as May 14, 1962, in *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 597, 82 S. Ct. 987, at page 990 stated:

> "The question, therefore, narrows to whether the prohibition * * * is a valid exercise of the town's police power. The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness', this court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton* v. *Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385 (1894), *is still valid today*. [Emphasis supplied].
>
> 'To justify the state in * * * interposing its authority in behalf of the public, it must appear—First, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' "

III. In Determining the Question of Reasonableness of Legislation Enacted under the Police Power, Courts Ordinarily Presume the Same to Be Constitutionally Valid, but Where an Almost Identical Enactment Has Previously Been Declared Unconstitutional, the Presumption Should Not Prevail or Exist and the Burden Should Shift.

The cases referred to by this court in the *Goldblatt* v. *Town of Hempstead* decision, *supra*, and those relied upon by the Appellant Ferguson [Brief, page 8] appear to concern legislation which has not been previously adjudicated to be unconstitutional. We believe this situation to be unique and therefore without precedent, and we submit that the Appellants are not justified in asking this court to indulge "every possible presumption in favor of its validity" nor to hold that the burden rests upon Appellee "to establish with convincing clarity that the statute infringes his constitutional rights". This for the reason that legislation almost identical to the act in question here was declared unconstitutional after its enactment in the State of Pennsylvania in the case of *Commonwealth* v. *Stone*, 91 Pa. Super. 117, 155 A.2d 453, prior to the adoption of this almost verbatim legislation by the Kansas legislature.

Even in the absence of that prior adjudication of unconstitutionality, a careful reading of the enactment's provisions clearly discloses its invalidity as an unreasonable prohibition of a lawful business or activity.

Although Appellee knows of no similar precedent, *i. e.*, the adoption of an act previously adjudicated in a sister state to be unconstitutional, situations have arisen where this court has recognized limitations of the area of application of the rules referred to above and contended for by

Appellants (See *e.g. Korematsu* v. *United States*, 323 U.S. 214, 215, 65 S. Ct. 193, 194; also *Ex Parte Mitsuye Endo*, 323 U.S. 283, 65 S. Ct. 208, 217).

We concede that the court here is not concerned with the wisdom of this legislation, but is concerned with the unreasonableness and the capricious and arbitrary character of the enactment which bears no real or substantial relationship to the only lawful objective and purposes which the Kansas legislature was entitled to pursue, to-wit: the regulation of an otherwise lawful acitivity. A state may not "under the guise of protecting the public interest arbitrarily interfere with private business by the use of unusual and unnecessary restrictions upon lawful occupations". *General Motors Corp.* v. *Blevins*, 144 F. Supp. 381.

Not only was this enactment the adoption by Kansas of an act already adjudicated to be unconstitutional, but in addition, the Kansas Supreme Court had, seven months prior thereto, struck down and invalidated a similar attempt to prohibit rather than regulate a similar lawful business in *Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672. There the lawful business which the Legislature attempted to prohibit rather than regulate, was new goods auction sales. *The Court declared that in Kansas the right to regulate and license a lawful business did not include the right to prohibit "directly or indirectly".*

The prior adjudication of unconstitutionality and the Kansas Supreme Court's ruling as to its limitation of the police power of the legislature to prohibit a lawful activity seems to make the statute in question unconstitutional on its face. We submit that under such circumstances the Appellants were not entitled to have the court below apply any presumption of constitutional validity.

Irrespective of the determination which the court makes of this unique situation, the question of presumption of validity is relatively unimportant as the Act and the evidence in the Court below clearly demonstrates the unconstitutional character of the legislation and establishes the fact that appellee overcame any presumption which might exist, because Appellee established the lawful character of the activity or business affected and thus compelled a finding by the court below that it was a lawful calling or business and the effect of the legislation was to so restrict the activity as to result in a practical prohibition of same.

IV. The Test or Standard by Which the Constitutionality of Kansas Legislation Is to Be Tested Has Been Pronounced and Defined by the Kansas Supreme Court and the Plaintiff, a Non-Resident of the State of Kansas, Is, under the Bill of Rights of the Kansas Constitution, Sections 1 and 17, Entitled to the Equal Protection of the Laws of the State of Kansas.

The court below found, and we submit, it cannot be successfully controverted that the business or activity defined by the statute in question is (1) a business affected with the public interest, and (2) a lawful business activity.

The Supreme Court of Kansas has declared that a business affected with the public interest is subject to reasonable legislative restriction and regulation to prevent abuses and frauds and requirements for licensing as well as other regulations which are reasonable would be upheld, but "the right to regulate and license the business does not, however, include the right to prohibit it directly or in effect to adopt unreasonable and unfair regulations

or such regulations as would be oppressive or highly injurious to the business. (*Gilbert* v. *Mathews*, 352 P.2d 58, 186 Kan. 672, 676.)

This same decision of the Kansas Supreme Court in 1960 further held and determined that while a large discretion is vested in the legislature to determine for itself what is deleterious to health, morals or is inimical to public welfare "it cannot under the guise of the police power, enact unequal, unreasonable and oppressive legislation or that which is in violation of the fundamental law." It was held and stated that the police power of a state, while not susceptible of definition with circumstantial precision, "must be exercised within a limited ambit and is subordinate to constitutional limitations," and that "there is no unrestricted authority to accomplish whatever the public may desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property *in particulars essential to the preservation of the community from injury.*" (page 677). The court held that a law which "places arbitrary and unreasonable limitations, regulations and impositions on the conduct of a lawful business and is designed to be so oppressive and unreasonable that it prohibits the conduct of such lawful business * * * violates the constitution * * * of the State of Kansas." (page 686).

In view of this criteria or standard announced by the Supreme Court of Kansas as the proper test of the validity of Kansas legislation under the provisions of the Kansas Constitution, the court below properly applied this rule to the enactment in question and properly concluded that so applied, the Kansas legislation was invalid and that the enforcement of the same against the plaintiff would deprive him of property and the pursuit of happiness without due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

CONCLUSION.

We respectfully submit for the foregoing reasons, the order and decision of the trial court should be affirmed.

Respectfully submitted,

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